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Ooi Meng Khin v Amanah Scotts Properties (KL) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W–02(NCC)(W)–2368–10 OF 2012, W–02(NCC)(W)–2402–10 OF 2012, W–02(NCC)(W)–2401–10 OF 2012 AND W–02(NCC)(W)–2369–10 OF 2012

ZAHARAH IBRAHIM, DAVID WONG AND ABANG ISKANDAR JJCA

12 JUNE 2014

Companies and Corporations — Indoor management rule — When applicable — Rule in Turquand's case — Presumption of regularity — Non-applicability of rule where forgery is involved

Equity — Restitution — Unjust enrichment — Knowing receipt — Essential elements to be established — Dishonesty — Stolen monies used for gambling in casino — Whether sufficient enquiries were made about origin of the monies — Whether person receiving the money has reason to believe that payment is being made in fraud of a third person — Whether willful blindness shown

An internal audit carried out by the plaintiffs showed that an amount of about RM31m from the plaintiffs' coffers had gone missing. It was found that one of the plaintiffs' employee ie the third defendant ('D3') had carried out some 173 unauthorised transactions to fund his own personal activities and had since absconded. The plaintiffs then initiated legal actions against several persons, including the fourth defendant ('D4'), a licensed money changer; the fifth defendant (('D5'), a general trader and the seventh defendant ('D7'), a partnership appointed by Genting Bhd to be its casino junket or commission agent to retrieve the monies that had been pilfered. In respect of D4, into whose bank account RM23m had been deposited, it had contended that it was just doing normal business and had nothing to suspect with regard to the source of the funds that had found their way into its account. D5 was a general trader and a commission agent. There existed no business relationship between P4 and D5. A sum of RM400,000 was transmitted into D5's account from the account of P4 for which no consideration had flowed from D5. D4 and D5 said they were not liable to pay for the plaintiffs' losses under the tort of knowing receipt when they had no knowledge of the fraudulent actions of D3. D7 had advanced monies to D3 to gamble. These debts were repaid to D7 not from the accounts of D3 but from the accounts of P1 and P4. A total sum of RM6.25m had been siphoned off the accounts of P1 and P4 to repay the gambling debts of D3 with D7. Both P1 and P4 had no business dealings with D7 so as to account for payments of such monies to D7. The case against D7 was couched upon the principle of knowing receipt. D7 contended that they

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were not in the business of nosing into where D3 had got the monies to gamble at Genting Casino. D7 claimed that it had converted the monies into gambling chips for use by D3 without having any knowledge of the source of the said amount and that they had altered their position such that it would be unconscionable to make them pay what they had not retained. They had paid the amount to their principal, Genting Casino. The learned trial judge had found all the defendants liable to the plaintiffs. The defendants appealed against that decision.

Held:

(1) Genting Casino was a disclosed principal of D7. In the circumstances, the D7 was a 'conduit pipe' in the sense that though the monies of P1 and P4 had admittedly passed through it, D7 had since passed in on to Genting Casino, being its principal. As such, D7 did not gain any benefit of the RM6.25m that had been transferred momentarily into its account. Hence, D7 was not unjustly enriched. There was nothing for D7 to restore to the plaintiffs. The plaintiffs had failed to fulfill the pre-requisites in a claim for unjust enrichment. Being a mere conduit pipe that it was, D7 had not unfairly benefitted at the expense of the plaintiffs (see paras 30–32).

(2) Central in the concept of knowing receipt is the proof of dishonesty on the part of the recipient, in this case D7. D7 had made inquires about the origin of the monies from D3 and was told that he was a director of P1. DW2 was satisfied with the answer and he could not be faulted for it (see para 34).

(3) If the creditor or the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money. However, there had been an absence of any evidence of the kind that would otherwise have required D7 to be put to inquiry as to how D3 had acquired the funds to repay his debts with D7. D7 was entitled to avail itself to the defence of change of position. Hence, D7's appeal was allowed (see paras 38–39 & 43).

(4) D4 was required to know its customer and to report suspicious transactions. Surely for large transactions which were substantial business to D4, it must have crossed his mind to visit P1 and to meet with the bosses there to know who they were and the nature of their business. There was an obvious case of willful blindness on its part when dealing with D3 as regards the source of the millions that had come into its account. All ingredients needed to be established to sustain a claim for knowing receipt against D4 had been established (see paras 50–51 & 53).

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(5) D4 could not avail itself of the *Turquand*'s rule by pleading that it had no notice whatsoever with the internal irregularities in the related affairs in P1 and P7. The evidence adduced pointed quite clearly in the opposite direction (see para 61).

(6) D4 lacked the necessary bona fides in his foreign currency transactions involving the unauthorised funds of P1 and P7. The duty of care on any reasonable moneychanger is to make reasonable inquiries in the event that something suspicious were to emerge in any transactions (see paras 63–64).

(7) There was no authorisation emanating from P4 for such money to be so transmitted to D5's account. This transaction was a curious one and one that was clearly and completely lacking any bona fide on the part of D5 when the sum of RM400,000 was received in its account from an 'utter stranger' in the form of P4 with whom D5 had no commercial dealings whatsoever. D5 was thus affixed with the knowledge that the transaction was not genuine and it could not be allowed to retain the benefit of the said payment.' The claim for knowing receipt against D5 had been proven on the balance of probabilities (see para 69).

[Bahasa Malaysia summary

Audit dalaman dilakukan oleh plaintif-plaintif menunjukkan bahawa sejumlah lebih kurang RM31 juta daripada tabung plaintif-plaintif telah hilang. Adalah didapati salah seorang daripada pekerja plaintif-plaintif iaitu defendan ketiga ('D3') telah menjalankan 173 transaksi tanpa kebenaran untuk membiayai aktiviti-aktiviti peribadinya dan telah lama melarikan diri. Plaintif-plaintif kemudiannya memulakan tindakan undang-undang terhadap beberapa orang, termasuk defendan keempat ('D4'), pengurup wang berlesen; defendan kelima ('D5'), peniaga am dan defendan ketujuh ('D7'), perkongsian yang dilantik oleh Genting Bhd untuk menjadi junket kasino atau ejen komisen untuk mendapatkan wang yang telah dicuri. Berkaitan D4, di mana RM 23 juta telah didepositkan ke dalam akaun banknya, dihujahkan bahawa ia hanya melakukan perniagaan biasa dan tidak mengesyaki apa-apa berkaitan punca dana yang masuk ke dalam akaunnya. D5 adalah peniaga am dan ejen berkomisen. Tidak wujud hubungan perniagaan di antara P4 dan D5. Sejumlah RM400,000 dihantarkan ke akaun D5 daripada akaun P4 yang mana tiada balasan bergerak daripada D5. D4 dan D5 menyatakan mereka tidak bertanggungjawab untuk membayar kerugian plaintif di bawah tort 'knowing receipt' apabila mereka tidak mempunyai pengetahuan mengenai tindakan fraud D3. D7 telah memberikan wang kepada D3 untuk berjudi. Hutang-hutang ini dibayar kepada D7 bukan daripada akaun D3 tetapi daripada akaun-akaun P1 dan P4. Jumlah keseluruhan sebanyak RM6.25 juta telah dikeluarkan daripada akaun P1 dan P4 untuk membayar hutang perjudian D3 dengan D7. Kedua-dua P1 dan P4 tidak mempunyai apa-apa urusan perniagaan dengan D7 untuk dikira bagi bayaran wang sedemikian

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kepada D7. Kes terhadap D7 diungkap atas prinsip 'knowing receipt'. D7 berhujah bahawa mereka bukan dalam perniagaan sibuk mencari daripada mana D3 mendapat wang untuk berjudi di Genting Casino. D7 mendakwa bahawa ia telah menukar wang kepada cip perjudian untuk penggunaan oleh D3 tanpa mempunyai apa-apa pengetahuan mengenai punca jumlah tersebut dan bahawa mereka telah mengubah kedudukan mereka supaya ia akan menjadi tidak berpatutan untuk membuat mereka membayar apa yang mereka tidak simpan. Mereka telah membayar jumlah tersebut kepada pinsipal mereka, Genting Casino. Hakim perbicaraan yang bijaksana mendapati bahawa kesemua defendan bertanggungjawab kepada plaintif-plaintif. Defendan-defendan merayu terhadap keputusan tersebut.

Diputuskan:

(1) Genting Casino adalah prinsipal D7 yang didedahkan. Dalam keadaan ini, D7 adalah 'conduit pipe' bermaksud bahawa walaupun wang P1 dan P4 telah diterima melaluinya, D7 telah memindahkan kepada Genting Casino, sebagai prinsipalnya. Oleh itu, D7 tidak mendapat apa-apa faedah daripada RM6.25 juta yang dipindahkan sementara ke dalam akaunnya. Maka, D7 tidak melakukan pengkayaan tak patut. Tidak terdapat apa-apa untuk D7 mengembalikan kepada plaintif-plaintif. Plaintif-plaintif gagal untuk memenuhi pra-syarat dalam tuntutan untuk pengkayaan tak patut. Sebagai hanya *conduit pipe*, D7 bukan secara tidak adil mendapat faedah daripada perbelanjaan plaintif-plaintif (lihat perenggan 30–32).

(2) Paling utama konsep 'knowing receipt' adalah bukti ketidakjujuran oleh pihak penerima, dalam kes adalah D7. D7 telah membuat pertanyaan tentang punca wang tersebut daripada D3 dan diberitahu bahawa dia adalah pengarah P1. DW2 berpuas hati dengan jawapan dan dia tidak boleh dipersalahkan (lihat perenggan 34).

(3) Jika pemiutang atau orang yang menerima wang mempunyai alasan untuk mempercayai bahawa bayaran dibuat dalam keadaan fraud oleh orang ketiga, dan orang itu membuat bayaran dengan menyerahkan dalam melepaskan hutangnya yang mana dia tidak ada hak untuk menyerahkan, dengan itu orang yang mengambil bayaran sedemikian tidak berhak untuk menyimpan wang tersebut. Walau bagaimanapun, tidak terdapat apa-apa keterangan yang membolehkan sebaliknya mengkehendaki D7 untuk membuat siasatan bagaimana D3 telah memperolehi dana tersebut untuk membayar balik hutangnya kepada D7. D7 berhak kepada 'defence of change'. Maka, rayuan D7 dibenarkan (lihat perenggan 38–39 & 43).

(4) D4 dikehendaki untuk mengenal pasti pelanggannya dan untuk melaporkan transaksi yang menimbulkan kesangsian. Semestinya untuk transaksi yang besar yang mana adalah perniagaan yang substansial

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kepada D4, ia mesti terfikir untuk melawat P1 dan bertemu dengan ketua-ketua di situ untuk mengetahui siapa mereka dan sifat perniagaan mereka. Terdapat kes jelas kebutaan sengaja daripada pihaknya apabila berurusan dengan D3 berkenaan punca wang berjuta ringgit yang masuk ke dalam akaunnya. Kesemua faktor yang perlu untuk dibuktikan untuk mengekalkan tuntutan untuk 'knowing receipt' terhadap D4 telah dibuktikan (lihat perenggan 50–51 & 53).

(5) D4 tidak dapat menguna pakai peraturan *Turquand* dengan memplid bahawa ia tidak mendapat apa-apa notis dengan luar aturan dalaman berkaitan hal ehwal dalam P1 dan P7. Keterangan yang dikemukakan mengarahkan dengan jelas arah bertentangan (lihat perenggan 61).

(6) D4 tidak mempunyai *bona fides* yang perlu di dalam transaksi mata wang asingnya yang melibatkan dana P1 dan P7 yang tanpa kebenaran tersebut. Kewajipan berhati-hati atas mana-mana pengurup mata wang yang munasabah adalah untuk membuat siasatan munasabah jika sesuatu yang menimbulkan kesangsian dalam mana-mana transaksi (lihat perenggan 63–64).

(7) Tidak terdapat kebenaran yang diperolehi daripada P4 untuk wang sedemikian dihantar ke akuan D5. Transaksi ini adalah salah satu cara dan satu yang jelas dan langsung tidak mempunyai apa-apa *bona fide* atas pihak D5 apabila wang sejumlah RM400,000 diterima dalam akaunnya daripada 'utter stranger' dalam bentuk P4 yang D5 tidak mempunyai apa-apa urusan perdagangan. D5 oleh itu ditambahkan dengan pengetahuan bahawa transaksi bukan tulen dan ia tidak dapat dibenarkan untuk mengekalkan faedah daripada bayaran tersebut. Tuntutan untuk 'knowing receipt' terhadap D5 telah dibuktikan atas imbangan kebarangkalian (lihat perenggan 69).]

Notes

For cases on unjust enrichment, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3118–3120.

For cases on when applicable, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 444–447.

Cases referred to

Agip (Africa) Ltd v Jackson and others [1990] 1 Ch 265, Ch D (refd)

Baden, Delvaux and Lecuit and others v Societe General pour Favoriser le Developpement du Commerce et de L'lndustrie en France SA [1983] BCLC 325, Ch D (refd)

Bank of Credit and Commerce International (Overseas) Ltd and another v Akindele [2001] Ch 437, CA (refd)

Barnes v Addy (1874) 9 Ch App 244 (refd)

Buller v Harrison (1777) 2 Cowp 565 (refd)

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George Raymond Zage III and another v Ho Chi Kwong and another [2010] 2 SLR 589, CA (refd)
Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Lipkin Gorman v Karpnale [1991] 3 WLR 10, QBD (refd)
Parkway Properties Pte Ltd & Anor v United Artists Singapore Theatre Pte Ltd [2003] 2 SLR 103, CA (refd)
Reynolds v Katoomba RSL All Services Club Ltd (2001) 189 ALR 510, SC (refd)
Royal British Bank v Turquand [1843–60] All ER Rep 435 (refd)
Ruben v Great Fingall Consolidated [1906] AC 439, HL (refd)
Selangor United Rubber Estates Ltd v Craddock (a bankrupt) (No 3) [1968] 2 All ER 1073, Ch D (refd)
Thomson v Clydesdale Bank Ltd [1893] AC 282, HL (refd)
Transvaal & Delagoa Bay Investment Co Ltd v Atkinson and Wife [1944] 1 All ER 579, KBD (folld)

Legislation referred to

Contracts Act 1950 s 183
Money Changing Act 1998 s 28(1)
Registered Clubs Act 1976 [AU]

Balvinder Singh Kenth (Harvinderjit Singh and S C Tey with him) (Balvinder Singh Kenth) in Civil Appeal No W-02(NCC)(W)-2368–10 of 2012 for the appellant.
Wong Chong Wah (Wong Chin Lieng and Wong Chun Keat with him) (Shahdan Wong Law & Assoc) in Civil Appeal No W-02(NCC)(W)-2369–10 of 2012 for the appellant.
Sulaiman bin Abdullah (Gregory Dicom with him) (AG Dicom) in Civil Appeal No W-02(NCC)(W)2401–10 of 2012 for the appellant.
Lee Pak Keong (Unrepresented) in Civil Appeal No W-02(NCC)(W) 2402–10 of 2012 for the appellant.
Porres P Royan (Chan Kok Keong, JH Yap and RZ Ng with him) (Shook Lin & Bok) in Civil Appeal No W-02(NCC)(W)-2368–10 of 2012 for the respondent.
Porres P Royan (Chan Kok Keong, JH Yap and RZ Ng with him) (Shook Lin & Bok) in Civil Appeal W-02(NCC)(W)-2369–10 of 2012 for the respondent.
Porres P Royan (Chan Kok Keong, JH Yap and RZ Ng (Shook Lin & Bok) in Civil Appeal No W-02(NCC)(W)2401–10 of 2012 for the respondent.
Porres P Royan (Chan Kok Keong, JH Yap and RZ Ng) (Shook Lin & Bok) in Civil Appeal No W-02(NCC)(W) 2402–10 of 2012 for the respondent.

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Abang Iskandar JCA (delivering judgment of the court):

[1] When a cheque meant to be paid to a client of the plaintiffs bounced upon its presentation for encashment at the bank, the plaintiffs carried out an internal audit to see what had gone wrong, such that the plaintiff's had not been able to honour the amount stated in the said cheque. In the course of such exercise, the team of internal auditors had uncovered that an amount totaling about RM31m from the plaintiffs' coffers had gone missing. That amount had been concerned with some 173 unauthorised transactions of four various types of non-compliances with internal procedures of the plaintiffs. These unauthorised transactions had happened within the period spanning June 2009 to December 2010. It was also established by the auditors that one assistant manager, by the name of Tee Poh Kun, with the Finance Department of the first plaintiff had been putting his hands into the plaintiffs' proverbial cookie jar to fund his own personal activities and had since absconded. The plaintiffs had then initiated legal actions against persons, both natural and juridical, who the plaintiffs alleged, had played their respective part in the financial fiasco, in the plaintiffs' quest to retrieve the monies that had been found to have been pilfered or siphoned off from them.

[2] The first plaintiff ('P1') is Amanah Scott Properties (KL), and at the material time was related to second to ninth plaintiffs. The second plaintiff ('P2') is Ascott Limited, Singapore. The third plaintiff ('P3') is Somerset Ampang, being the owner of Somerset Ampang. The fourth plaintiff ('P4') is Liang Court (Malaysia). The fifth plaintiff ('P5') is Amanah Ascott Management SB. The sixth plaintiff ('P6') is Amanah Scotts SB. The seventh plaintiff ('P7) is Ascott International Management (M) SB. The eighth plaintiff ('P8') is the SSBC SB while the ninth plaintiff ('P9') is Wisma Matex Sdn Bhd. Combined together, the plaintiffs were known as the Malaysian Cluster.

[3] The first defendant ('D1') is Ooi Meng Khin, who was the financial controller of The Ascott Kuala Lumpur and of first plaintiff. The second defendant ('D2') is Lee Pak Keong who was the deputy director, Finance of The Ascott Kuala Lumpur and first plaintiff. The third defendant ('D3') is Tee Poh Kun, the assistant manager finance of first plaintiff. The fourth defendant ('D4') is Akbar Money Changer Sdn Bhd, a licensed money changer. The fifth defendant ('D5') is NANJ Global Resources Sdn Bhd a general trader. The sixth defendant ('D6'] is Anjung Mekar Sdn Bhd (had since been wound up). The seventh defendant ('D7') is BP Galaxy Junket, a partnership appointed by Genting Bhd to be its casino junket or commission agent.

[4] When the trial started, there was a myriad of claims filed against the various above-named defendants. However, as against D1 and D2, the causes

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of action predicated upon allegations of fraud and conspiracy to defraud were however subsequently abandoned by the plaintiffs at the end of trial, before the learned trial judge. Also abandoned was the claim founded upon breach of fiduciary duty. So, what were left as against the D1 and D2 were only actions based on breach of employment contract to exercise reasonable skill and care or tortuous negligence. In essence, it was related to their performance of duty in their designated capacity which was to safeguard assets and monies of the plaintiffs. As against D4, D5 and D7, the cause of action was for recovery of monies as a result of knowing receipts or dishonest receipts.

[5] In their defence, D1 and D2 said that they relied on the monthly bank reconciliation statements and had no idea about D3's illegal activities.

[6] They also said that the banks should be held responsible based on the principle of *novus actus* interveniens in that they had been guilty of negligence due to the act of the banks in paying monies out of the plaintiffs' accounts without proper mandate.

[7] In respect of D4, into whose bank account RM23m had been deposited, it had contended that it was just doing normal business and had nothing to suspect with regard to the source of the funds that had found their way into its account. D4 had dealt with D3 (as the plaintiffs' agent) and D5's role in the RM400,000 transferred from P4 to D5, 'apparently to settle some account between D4 and P4. Both D4 and D5 said they were not liable to pay for the plaintiffs' losses under the tort of knowing receipt when they had no knowledge of the fraudulent actions of D3.

[8] In respect of D7, this casino junket contended that they were not in the business of nosing into where D3 had got the monies to gamble at Genting Casino. An amount of over RM6m (RM3.8m + RM2.45m) was channeled into the account of D7 from P1 to P4. D7 had converted this amount into gambling chips for use by D3 without having any knowledge of the source of the said amount and further they had altered their position such that it would be unconscionable to make them pay what they had not retained. They had paid the amount to their principal, Genting Casino, for which D7 was but an agent.

[9] At the end of the trial in the court below, the learned trial judge had found all the above defendants liable for the wrongs which the plaintiffs had levelled against them. Judgments were entered against them and they were ordered to pay the respective monetary orders as appeared in the decision of the learned trial judge.

[10] D1, D2, D4, D5 and D7 had since filed in court their respective appeal

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against the decision of the learned trial judge. Hence these appeals before us. A

[11] We had occasion to listen to the submissions put forth by the respective learned counsel appearing for all parties. After due deliberations at the conclusion of the submissions, we had unanimously dismissed the appeals of D1, D2, D4 and D5 with costs. We had also dismissed the D4's appeal on the dismissal of its counterclaim against P1. At the same time, we had allowed the appeal of D7 with costs. We now give our reasons for coming at those various decisions with regards to these various appeals. B

THE APPEAL OF D7 (BP GALAXY JUNKET) C

[12] The claim against D7 was filed by Amanah Scotts Properties (KL) Sdn Bhd (P1) and Liang Court (M) Sdn Bhd (P4). P1 had sued for a sum of RM3,800,000 and P4 had sued for the sum of RM2,450,000 thereby totaling RM6,250,000 in all. D

[13] From the papers filed with the Court, D7 was at the material time, a partnership that was appointed by Genting Malaysia Bhd. The latter operated a casino business and D7 was appointed as its commission agent. As was aptly described by the learned trial judge, the D7's nature of business could be 'discreetly described as that of making arrangement for customers to participate in the gambling activities of the Genting Casino at D7's expense in consideration of a certain percentage of agreed commission (rebate) to be paid by Genting Malaysia to D7'. E F

[14] How the suit between these parties had been occasioned may be described as follows: One person by the name of Tee Poh Kun (D3), the assistant manager of P1 had been coming to the Genting Casino to gamble. His gambling stakes had been rather high and impressive that they had caught the eyes of one Mr Lim Jit Hiang. Mr Lim Jit Hiang was a partner of D7 and he had noted D3's gambling pattern and soon D3 was invited by D7 as a VIP customer at Genting Casino. Now what that meant was that D3 had a distinct advantage in that D7 would advance monies to D3 to gamble, which monies D3 would invariably have to repay in the event that he made a nett loss, which indeed had happened in this case. So, D3 had to repay the advances made by D7 to him that he had whittled away at the gaming table at the Genting Casino. As it had turned out, it had run into millions of ringgit. G H

[15] The debts were repaid to D7 but not from the accounts of D3. There were paid into the account of D7 from the accounts of P1 and P4. It is the undisputed fact in this case that D3 was the rogue employee of the P1 who was at the material time an assistant manager in P1's Finance Department. He had since performed a *Houdini*'s act and was nowhere to be found, but a judgment I

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in default had been entered against him.

[16] So, when the whole scheme was uncovered, it had come to light that the sum of RM6.25m had been siphoned off the accounts of P1 and P4 to repay the gambling debts of D3 with D7. Both P1 and P4 had no business dealings with D7 so as to account for payments of such monies to D7. That had accounted for the present suit by P1 and P4 against D7 for the sum of RM6.25m to be returned to them in the amount as per claimed. Their cause of action was based on knowing receipt on the part of D7.

[17] The learned trial judge had agreed with the submissions of the learned counsel for the P1 and P4 (respondents in this appeal) on that ground of knowing receipt against D7 and that the D7 could not avail itself of the defence of change in position. In the course of his judgment, the learned trial judge had referred to the case of *Agip (Africa) Ltd v Jackson and others* [1990] 1 Ch 265 and *Lipkin Gorman v Karpnale* [1991] 3 WLR 10 and having considered the evidence before him, he had concluded as at p 387 of the record of appeal, like so:

> I agree with the Ps' submission that P1 and P4 had no obligation to perform the contract concluded between D3 and D7. Furthermore no consideration had been given by D7 to P1 and for the payments made by them. To allow D7 to retain the monies received from P1 and P4 when there had been a total failure of consideration would amount to unjust enrichment.

He further held at the same page:

> I find that D7 was in knowing receipt of the above under circumstances where it ought to inquire further and as such D7 is to account for these sums to P1 and P4. D7 is to restore the benefit conferred by returning the monies to P1 and P4. I allowed judgment for the above sums in favour of P1 and P4 to be so entered.

[18] To recap, the case against the D7 had been couched upon the principle of knowing receipt. In the course of submissions before us, it was contended by both learned counsel for D4, D5, and D7 that the plaintiffs/respondents had not pleaded this principle of knowing receipt in their pleadings. It was submitted that no such words as 'knowing receipt' could be seen in the statement of claim filed in this case. The learned counsel for the plaintiffs had disagreed and had directed our attention to paras 92 and 94A of the statement of claim as amended. Those paragraphs are now reproduced here for ease of reference:

> 92 The plaintiffs contend that the payments referred to in para 67 hereinabove that were made to and received by the fourth to seventh defendants were made unlawfully and/or dishonestly and/or fraudulently by the first, second and third defendants' in breach in breach of their obligations and/or duties, fiduciary, contractual, tortious or otherwise.

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Further in para 94A it was pleaded as such:

> 94A Yet further or in the alternative, in so far as the fourth to seventh defendants purportedly transacted or dealt with the third defendant in relation to any of the impugned transactions set out in para 67 hereinabove, the plaintiffs contend and will contend that, having regard to all the suspicious and/or unusual circumstances surrounding such transactions, including but not limited to the status of the third defendant as an ordinary employee and the unusual nature of and sums of money involved in such transactions, the fourth to seventh defendants were under a duty or obligation to make reasonable inquiries in respect of such transactions, which the fourth to seventh defendants failed to do.

[19] Having considered these paragraphs, we had agreed with the learned counsel for the plaintiffs that they had sufficiently described the cause of action against the D4 to D7 based on knowing receipt. As such, we saw no merit in the complaints raised by learned counsel on the pleadings, or the lack of it, on knowing receipt.

[20] Learned counsel for D7, Mr Wong had submitted before us and had also raised a few points, as appear in his written submissions, for our consideration. In the main, his case had been that on the facts pertaining to his client, knowing receipt ought not to apply, that there had been a change in position and that there was no unjust enrichment on the part of D7.

[21] Perhaps it would be opportune to dwell a little on the concept of knowing receipt and what it entails as a legal doctrine of some consequence. This concept has its origin in the decision of Lord Selborne LC in the case of *Barnes v Addy* (1874) 9 Ch App 244. Commonly described as 'knowing receipt' and 'knowing assistance', these two equity based causes of action are distinct causes of action and they enable a claimant to sue a third party for breach of trust or fiduciary duty. In both these causes of action of receipt and assistance, the essential element that the claimant will have to establish against the third party is that his receipt of the claimant's property must be one that was dishonest, and that the assistance rendered was also dishonest, in which case, he has acted as an accessory to the breach of trust. In this case, we are concerned with the concept of knowing receipt or dishonest receipt by D7 of P1's and P4's monies to the tune of about RM6.25m.

[22] We noted that the learned trial judge had rightly referred to the Singapore case of *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 which had in the course of its deliberation, referred to the decision of learned Justice Nourse LJ in the English Court of Appeal case of *Bank of Credit and Commerce International (Overseas) Ltd and another v Akindele* [2001] Ch 437 where the learned Lord Justice had stated the test in determining precisely the degree of knowledge for the recipient of trust

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property, to be fixed with liability, to be as follows, namely,

> [T]the recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.

[23] Learned Justice VK Rajah JA in the *Zage III*'s case had gone on to explain the practical difficulty in implementing the test as laid down by Nourse LJ in the *Akindele*'s case and in doing so, the learned judge VK Rajah had said:

> As candidly acknowledged by Nourse LJ when he formulated the test in Akindele (23), unconscionability is a malleable standard that is not free from difficulty in its application. The degree of knowledge required to impose liability will necessarily vary from transaction to transaction. In cases where there is no settled practice of making routine enquiries and prompt resolution of the transaction is required it seems to us clear that clear evidence of the degree of knowledge and fault must be adduced. We are also inclined to agree that the test, as restated in Akindele, does not require actual knowledge. This would be contrary to what we believe was the spirit and intent of Nourse LJ's formulation: it seems to us that actual knowledge of a breach of trust or a breach of fiduciary duty is not invariably necessary to find liability, particularly, when there are circumstances in a particular transaction that are so unusual, or so contrary to accepted commercial practice, that it could be unconscionable to allow a defendant to retain the benefit of receipt. The test of unconscionability should be kept flexible and be fact-centered. (see p 372 of ROA)

[24] With respect, we found that the learned trial judge did not err in adopting the test the Lord Justice Nourse's test as enunciated in the *Akindele*'s case and further clarified by Justice VK Rajah JA in the *Zage III*'s case.

[25] It would be useful to now look at the essential ingredients that would need to be proven by a claimant desirous of benefitting from utilising this concept of knowing receipt to found his cause of action against the third party recipient. Again, assistance may be obtained from the case of *Zage III*'s case where three elements needed to be fulfilled, namely: (a) a disposal of the plaintiff's assets in a breach of fiduciary duty (b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff, and (c) knowledge on the part of the defendant that the assets received are traceable to the a breach of the fiduciary duty.

[26] In relation to D7, the learned trial judge was satisfied that the plaintiffs had established all these ingredients and had concluded that in the circumstances, D7 was in knowing receipt where it ought to inquire further as to the source of D3's repayment of his debts with D7 for the advances that he had gambled away.

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[27] Learned counsel for D7 had argued that the learned trial judge in the court below had erred in that he had failed to consider the fact that D7 was a mere agent for its principal, Genting Casino. Under s 183 of the Contracts Act 1950, it is provided, inter alia:

> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

[28] He had also relied on the case of *Buller v Harrison* (1777) 2 Cowp 565 at p 1244 where it was held that where money was mispaid to an agent expressly for the use of its principal and that the agent had paid it over, then the agent is not liable in an action by the person who mispaid it. But the person who had so mispaid is not without remedy, as he can proceed to sue for his remedy from the principal. Again, the principle was further reiterated in the case of *Transvaal & Delagoa Bay Investment Co Ltd v Atkinson and Wife* [1944] 1 All ER 579 where it was held that:

> On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing on it to a third party, and has handed it on, is no longer accountable to the sender.

[29] Also, it was stated in that *Transvaal*'s decision by Atkinson J, after citing Romer LJ, that when the mistake was discovered, the plaintiffs became entitled to recover the monies from the defendants, 'unless the defendants could show that they had received the monies as agents, and before notice of the mistake, had parted with them to their principal, or so dealt with them by mandate of their principal as to render it unjust to call upon them to repay the monies to the plaintiffs'.

[30] With that backdrop of legal proposition, learned counsel was correct to submit that the learned trial judge had erred in fixing liability onto his client, D7. We agreed that D7 was, for all intents and purposes, an agent of Genting Casino. In fact this factual circumstance was agreed between the parties. This cannot be disputed as it was evidently contained in the statement of agreed facts, common bundle tab 7 in the ROA. Genting Casino was a disclosed principal of D7. In the circumstances, the D7 was a 'conduit pipe' in the sense that though the monies of P1 and P4 had admittedly passed through it, D7 had since passed in on to Genting Casino, being its principal. Millet J, whose decision in *Agip (Africa) Ltd v Jackson and others* [1990] 1 Ch 265 was referred to by the learned trial judge in the court below had occasion to say, after adverting to the factual matrix before him involving the issue of the true role of agents, as follows:

> In such a case, the agent is treated as a mere conduit pipe and the money is taken as having been paid to the principal rather than the agent.

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[31] As such, in this case as the evidence had shown that the monies from P1 and P4 had been passed on to Genting by D7, the latter did not gain any benefit of the RM6.25m that had been transferred momentarily into its account as the same amount had been transmitted to its principal, Genting. As such, D7 was not unjustly enriched in the circumstances. We agreed with learned counsel for D7 that there was nothing for D7 to restore to the plaintiffs.

[32] While on the issue of unjust enrichment, we were also in agreement with learned counsel for D7's submission that the plaintiffs had failed to fulfill the pre-requisites in a claim for unjust enrichment as laid down by the learned authors in *The Law of Restitution*, (6th Ed) at p 17 para 1–016. It has been outlined therein that the claimant must show that the defendant has been enriched by a benefit; that the benefit had been obtained at the expense of the plaintiff; and that the benefit must be gained in circumstances where it would be unjust for the defendant to retain the same. Being a mere conduit pipe that it was, D7 had not unfairly benefitted at the expense of the plaintiffs in this case.

[33] As regards the issue of 'knowing receipt', it will be recalled that the learned trial judge had found D7 wanting in that regard based on his conclusion that D7's failure to inquire further into the source of D3's funds has rendered D7 to be dishonest and was therefore in knowing receipt of the RM6.25m and was therefore legally bound to restore the said sum to the plaintiffs. He had relied on the case of *Agip* in attaching dishonesty on the D7 in this case. In particular, he had emphasised on that portion of Millet J's decision citing Peter Gibson J in *Baden, Delvaux and Lecuit and others v Societe General pour Favoriser le Developpement du Commerce et de L'Industrie en France SA* [1983] BCLC 325 where it was said:

> But if he did suspect wrongdoing yet failed to make inquiries because he 'did not want to know' or because he regarded it as 'none of his business', that is another matter. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, there are treated as if they had actual knowledge.

[34] Central, therefore, in this concept of knowing receipt is the proof of dishonesty on the part of the recipient, in this case D7. In determining the existence of that required mental element on the part of D7 learned counsel Mr Wong had referred us to the evidence of Mr Lim (DW2) in particular, in written statement in Q 21, like so:

> 21.Q: Why not?
>
> A: It is a common practice of a junket anywhere in the world, not to ask to enquire into whether the payments made by the customers were authorised or lawful and the source of their funds. Furthermore, it is

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> almost impossible and impractical for the seventh defendant to check whether each and every payment made by the customers were proper or not or against the laws as we have quite a number of customers and the customers might get annoyed/angry if we asked such things/questions which are very sensitive to them. Besides, we may not get any customer in the first place if we asked such questions or made such enquiry.

[35] During cross-examination by learned counsel for the plaintiffs, Mr Lim (DW2) testified as follows:

> PPR: Yes Mr Lim, I hear what you say. I'm asking you when the bank statement came and it showed that a sum of RM430,000 came from this company called, Amanah Scotts Properties (KL) which was not your customer, did it not raise a question in your mind as to how this money came into your account?
>
> Lim: Yes, I did ask Tee Poh Kun once. He informed me that he is the director of the said company.

[36] Under the circumstances, we had agreed with Mr Wong learned counsel for D7 that D7 had indeed made inquires about the origin of the monies from D3 and was told that he was a director of P1. DW2 was satisfied with the answer and in our view he could not be faulted for it, as was held, in the Privy Council case of *Selangor United Rubber Estates Ltd v Craddock (a bankrupt) (No 3)* [1968] 2 All ER 1073 as follows:

> when, on inquiry, an answer is received which the enquirer may reasonably believe to be true, he is entitled to act on it.

[37] It was also noted that having cross-examined DW2 on the source of D3's repayment funds, and having been told by DW2 that it had come from P1's account (instead of D3's own account), it was never put to DW2 by learned counsel for the plaintiffs that DW2 was dishonest when he failed to inquire further into the matter. In the circumstances, we agreed with the learned counsel for D7 that learned trial judge was in error when he had imputed dishonesty on D7 for failing to inquire further on the source of the funds emanating from P1 in purported repayment of D3's gambling debts with D7. Actually, there is a legal proposition of high authority, no less than the House of Lords of England in the case of *Thomson v Clydesdale Bank Ltd* [1893] AC 282 where it was held by Lord Herschel LC as follows:

> It cannot, I think, be questioned that under the ordinary circumstances a person, be he a banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paving the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt that which is due to him ...

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[38] Of course that position is caveated with the qualification that if the creditor or the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon ordinary principles which we had discussed prior.

[39] Again, in the context of the evidence in this case, we agreed with the learned counsel for D7 that there had been an absence of any evidence of the kind that was alluded to by Lord Herschel which would otherwise have required D7 to be put to inquiry as to how D3 had acquired the funds to repay his debts with D7. In fact, the evidence of DW2 had shown that he did in fact inquire from D3 whose answer had satisfied him.

[40] In the context of this case pertaining to D7, we were further emboldened in our view that there was no need for D7 to further inquire, on account of the Australian case of *Reynolds v Katoomba RSL All Services Club Ltd* (2001) 189 ALR 510. In that case, it was held:

(a) the duty for which the appellant contends is a duty to infringe a gambler's individual autonomy. Such a duty of care would be impractical to impose. The club is unlikely to know, or to be able to find out the gambler's financial position and priorities in expenditure, in order to decide whether to advise against gambling or that the facility of cashing cheques should be denied to the gambler: at (143).

(b) the activities of the club, including the making available of facilities for gambling, were legitimate activities permitted pursuant to the provisions of the Registered Clubs Act 1976 (NSW): at (126).

[41] Likewise in the case before us, here D7 was a legal entity properly authorised to act as an agent of Genting to facilitate licensed gambling activities at the casino that was frequented by D3.

[42] As regards the issue relating to the defence of change of position, the learned trial judge had denied this defence to D7 as he had found it to be dishonest. It would appear that the learned trial judge had so held as he had thought that there was a lack of bona fide on the part of D7 in the whole scheme of things. Perhaps on this matter, the speech by Lord Goff in the case of *Lipkin Gorman v Karpnale* [1991] 3 WLR 10 is worth a short revisit, where the learned judge had said:

> The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

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[43] Having said that, Lord Goff had gone on to limit the application of this defence to a defendant if he had not so acted in bad faith and that it should also not be made available to a wrongdoer. In the circumstances of this case, D7 was only a mere conduit and that it had not been dishonest and as such it ought to be entitled to avail itself to the defence of change of position. As the evidence had shown, D7 did not benefit at the expense of the plaintiffs (see also the case of *Parkway Properties Pte Ltd & Anor v United Artists Singapore Theatre Pte Ltd* [2003] 2 SLR 103 for the ingredients of this defence).

[44] We therefore had agreed with learned counsel for D7 that the learned trial judge had fallen into error in respect of his findings with regard to D7's position and that what learned Justice Chang Min Tat FJ in the Federal Court case of *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139 would aptly describe the error, like so:

> But quite clearly, his decision was reached via an inference drawn entirely from a serious error of fact and in drawing this inference, he had not merely considered evidence which was not established but had failed to take into account the probative value of evidence which had been proved or was common to both parties.

[45] For the above reasons, we had allowed the appeal lodged by the D7 with costs.

THE APPEAL OF D4 (AKBAR MONEY CHANGER)

[46] And now then, there is the appeal lodged by D4 ('Akbar Money Changer') who was aggrieved by our decision that had upheld the learned trial judge's finding it (D4) liable also of knowing receipt in relation to the P1's and P7s' monies in the amount of over RM23m.

[47] During the hearing of this appeal, learned counsel for D4 and D5, Sulaiman bin Abdullah had at the outset indicated to us that he was adopting the submissions put forth by learned counsel Mr Wong for D7 on the issue of knowing receipt. It was his submission that there was no dishonesty on the part of D4 when it received the various sums of monies from P1 and P7 into its bank account.

[48] At this juncture, we would like to advert to that part of the learned trial judge's judgment where he had found D4 liable for having committed knowing receipt in respect of the plaintiffs' monies. It had appeared at p 366 of the ROA as follows:

> However it is finding of this court that his suspicion should have been aroused because of the unusually large transactions and the fact that he was prepared to give a running creditor-debtor account to the Ps. At some point there was outstanding to the tune of more than RM 2 million in terms of what D4 said was owing by P1.

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> Could one have allowed such an account to be opened and operative with such a risk without proper resolution for the opening of an account or even a formal letter to that effect with the authorised personnel being named as being authorised to deal with D4? Surely DW7 would be concerned if he had passed the foreign currencies equivalent to the right person D3. He should at least have protected himself by getting a letter of authorisation from the P1 authorising D4 to hand over the foreign currencies exchanged to D3.

[49] Learned counsel for D4 had contended that there was no reason why D4 ought to become suspicious of the various transactions because the amounts involved were consistently large. He argued that it would raise suspicion if a large sum had occurred in the midst of transactions involving only small sums. As they were consistently large, therefore, it was submitted that there was no cause for suspicion to be aroused on the part of his client, D4.

[50] With respect, we would be able to agree with learned counsel for D4 on that score, if that situation was to be considered in isolation, devoid of other factual circumstances. However, in this case involving D4, there were present factual circumstances that would render such submissions by learned counsel for D4 rather difficult to accept as a reasonable explanation that could exculpate it from liability for knowing receipt of the sums of monies from the relevant plaintiffs. In fact, the learned trial judge had extracted those circumstances and adverted to them in his judgment. This appears at pp 366–370 of the ROA, as follows:

> The license number printed in most of the invoices raised was that of a license that had expired namely License No 01356. DW7's explanation was that he did not change the number in the computerised invoice document saved in his computer. However that would be more believable if other customers for that period also had the expired license number in their invoices but no evidence was led on that. D4 also did not comply with the requirements of Section 28(1) of the Money Changing Act 1998 which requires D4 to issue original receipt to the customer containing certain specific particular. DW7 had not given a convincing explanation as to why D4 had not complied with it.
>
> Indeed the evidence led by the Ps was that there were genuine purchase of currencies by P1 from D4 in 2009 to 2010 but these were for amounts not exceeding RM 7,000.00 only for any particular transaction. These genuine transactions are summarized at Bundle K page 3 which revealed that for more than a year, only an aggregate of RM31, 229. 98 worth of foreign currencies were purchased by P1, P7 and P8 from D4. It is strange to note that none of these genuine transactions except for one were reflected in D4's 'Customer Account Listing' documents marked as Exhibits D717 and D718 at Bundle C11 pages 2424-2430 and 2595-2602 respectively. In the light of DW7's evidence on behalf of D4 that the Customer Account Listing represented the running account between Ps and D4, one cannot be faulted for wondering if the so called Customer Account Listing is a separate arrangement between D3 and D4.
>
> The Customer Account Listing produced by D4 in Exhibit D717 and D718

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showed that it had the feature of an overdraft account in that D4 purportedly advanced foreign currency to its 'customer' first and received payment in local currency later. Looking at the Listing for the period 1 January 2009 to 31 December 2009, one would not know that there were many foreign currency transactions between D4 and its 'customer' from the first entry dated 3 February 2009 to 26 June 2009. Among those entries were entries with the description 'MYR PYMT FRM TEE' which DW7 confirmed were cash Ringgit payments by D3. DW7 only knew D3 as the Finance Assistant/Executive of P1. Why would D3, a mere Finance Assistant in P1 pay cash to D4 to reduce the outstanding on the account?

There were also large deposits of cash even up to more than RM 200,000.00 in some instance from D3 into D4's account. There were also payments in from D1's cheques and cheques from joint account of D1 and D3 and another. There was no arrangement that Ps would receive the currencies in advance from D4 through D3 and pay later. Bearing in mind that the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLA') had already come into force then, D4 is required to know its customer and to report suspicious transactions. See section 14 of AMLA and listed in Part 1 of the First Schedule to AMLA. Surely for large transactions which are substantial business to D4, it must have crossed his mind to visit P1 and to meet with the bosses there to know who they are and the nature of their business. It would be prudent to raise the fact of the overdrawn account and see what the bosses had to say. Why would a company running service apartments need so much foreign currencies? If at all they would be changing foreign currencies to ringgit! D4 by its very own admission said in paragraph 6.12 of its Amended Defence that DW7 and its other directors were queried by Bank Negara on various occasions pertaining to certain large amount of funds received from P1. However at the trial no evidence was proffered by DW7 on what were the queries and if so what D4 itself had ascertained from P1 by conferring with its bosses in wanting to clear any suspicion that it could be involved in money-laundering.

D4 had in its Amended Statement of Defence (Bundle A pages 260-269) alleged that P1 had transmitted to D4 a letter from Bank Negara dated 9 June 1998 approving P1's request to acquire a credit facility of RM 32 million from Scotts Holding Ltd Singapore to induce D4 into dealing with P1 on a regular basis to supply various foreign currencies. Surprisingly this letter was never produced at trial by D4. DW7 also did not refer to it at all in his evidence. One would have thought that if there were such a letter justifying D4 dealing in such a large exchange of foreign currencies, surely DW7 would want to refer to it to defend D4's claim that it cannot be held liable in any way for having innocently dealt with D3.

D4 was under the circumstance put on a duty to inquire further and his failure to do so under the current circumstances would make him liable under knowing receipt of the monies for which he would be held accountable to the rightful owner of the monies.

[51] With respect, we found that the learned trial judge was correct in his conclusions, for the reasons advanced by him in his considered appreciation of the evidence led by the plaintiffs, against the D4. Clearly there was an obvious

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case of willful blindness on its part when dealing with D3 as regards the source of the millions that had come into its account. As the saying goes, 'there is none so blind as those who will not see'.

[52] As alluded to earlier, in learned trial judge's judgment referred to above, the learned counsel for D4 had submitted that DW7 had testified during trial that D4 had no reason whatsoever to suspect anything to be amiss so as to arouse a tinge of suspicion on the part of D4 in respect of the 76 transactions involving P1's and P7's monies amounting to over RM23m in all, for purported foreign currencies transactions. That was the crux of the defence of D4 and this contention was repeated before us by D4's learned counsel during the hearing of this appeal.

[53] We had looked at the appeal records and we had found that such contention made on behalf of D4 could not, with respect, be sustained. In fact, it flew across the face of the evidence that was adduced by the witnesses for the plaintiffs. In the circumstances of this case against D4, all the ingredients needed to be established to sustain a claim for knowing receipt, as claimed by P1 and P7 against D4, had been established as found by the learned trial judge in his grounds of decision. We noted that there were seven findings made out by learned trial judge that he had used to conclude that D4 ought to be, and was indeed, liable for knowing receipt of P1's and P7's monies.

[54] We now reproduce those seven findings made by the learned trial judge which appear at pp 374–376 of the ROA as follows:

> I agree with the Ps' submission as summarized below that these facts point on a balance of probabilities to the fact that it would be unconscionable for D4 to say that it cannot be held liable for the monies that went into his account because it had passed on the benefit in the foreign currencies exchanged for to D3 and only earned from the exchange rate:
>
> (1) There was no representation to D4 emanating from P1 and/or P7 with regard to D3's authority to enter into the impugned transactions;
>
> (2) D4 knew or must have known that P1, a serviced apartment operator would not, in the ordinary course of business, require large amount of physical foreign currency. If at all, P1 would wish to exchange foreign currency paid by its customers to be converted to local currency;
>
> (3) D4 knew or ought to have known that its customer was not P1 or P7, neither having made any formal application nor provided any documents for the opening and maintenance of an account with D4;
>
> (4) The listing prepared and kept on his own admission by DW7 in the name of P1 as D4's customer had entries showing receipts from D3 personally, from D1, D3 and another and from others unknown. DW7 clearly knew

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more than he owned up to and leads to the inference that the account was spurious and was a label to hide the true nature of the account. A

(5) D4 was aware that the physical foreign currency was being delivered to D3 and not P1 or P7 and unlike in the genuine transactions, was being acknowledged by an entirely different chop.

B

(6) D4's knowledge that the impugned transactions were suspicious is also shown by the issuance of numerous receipts that each contained an entry of D4's money changer's license which had expired instead of containing the current licence number

(7) The value of the impugned transfers was large by any standard and must singly or together with the other circumstances sounded warning bells and flashed warning lights to D4. C

[55] We had adverted to the fact that the learned trial judge had come to seven findings of facts that had become the bedrock of his considered view that D4 was liable for knowing receipts of monies belonging to P1 and P7. Indeed, from our perusal of the evidence led by the plaintiffs, it would appear to us that D4 had not only had reason to be suspicious (dishonest knowledge) that the source of the monies that it had received was less than innocent, in fact D4 was itself clearly not entirely above board in its conduct, when it had used an expired licence number when issuing the receipts for these impugned transactions. No reasonable explanation was given during trial for this apparent unusual practice, a clear departure from normal commercial practice. To our considered mind, the learned trial judge was entirely entitled to come to the conclusion that he did on this matter, in the circumstances of this case. D E F

[56] While the principles on knowing receipt are rather trite and settled but their application to cases brought before the courts may yield different results, depending, to a very large degree, on the factual matrix that may obtain before the trial courts. In these appeals before us, while D7 (BP Galaxy Junket) could not be held liable for knowing receipt of monies belonging to P1 and P4, the same cannot be said about D4 (Akbar Money Changer). In our view, the learned trial judge was correct in his findings that based on the evidence adduced before him, it would be unconscionable to allow D4 to retain the monies belonging to P1 and P7. It is clear to us, as it was clear to the learned trial judge, that D4 had dishonest knowledge when it received the huge sums amounting to over RM23m mainly from the accounts of P1 and P7 with whom it had no formal business relations (except for a few transactions amounting to slightly over RM31,229.98 only). The alarm bells ought to be ringing noisily in its ears regarding its dealings with Tee (D3) throughout the 76 transactions. Instead, it was rather apparent to us that, those ringing bells were indeed music to D4's ears! G H I

[57] Learned counsel for D4 had also submitted before us that the rule in the

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famous *Turquand*'s case ought to be applied in this case to exonerate his client. That issue was contained in its amended statement of defence dated 13 May 2011 appearing in para 6.11 in the following terms:

> 6.11 Defendan keempat menyatakan bahawa sebagai pihak ketiga yang berurus dengan plaintif pertama secara sah, defendan keempat tidak perlu bertanya berkenaan dengan urusan dalaman dan presiding plaintif pertama dan boleh menganggap bahawa kesemua perlu dibuat telah dibuat secara lazimnya menurut Memorandum dan Perkara-Perkara Persatuan Plaintif Pertama.

[58] Now, the so-called *Turquand*'s rule has its genesis in the decision of Lord Jervis CJ in the case of *Royal British Bank v Turquand* [1843–60] All ER Rep 435 where it was articulated in the following manner:

> We may now take for granted that the dealings with these companies are not like dealings with other partnerships and that parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorising that which on the face of the document appeared to be legitimately done.

[59] The Exchequer Chamber that heard that case therefore had held that the company was entitled to sue on the bond. As the requirement for the resolution was a matter of internal regulation for the company and the bank could not know whether such resolution had in fact been passed, it was entitled to presume that the resolution had indeed been passed. Since then, the courts have explained the extent of its application to parties who may avail themselves to the benefit that the *Turquand*'s rule can bestow upon them in a given case. The rule in *Turquand*'s case is a presumption of regularity. In other words, a person dealing with the company is entitled to presume that all the internal procedures of the company have been complied with. This is a practical approach to solving problems facing outsiders because an outsider would have difficulty to discover what is going on in the company. As such, the *Turquand*'s rule is sometimes referred to as the indoor management rule.

[60] The applicability of the *Turquand*'s rule is fully circumscribed, in that it is only applicable in aid of a person who deals with a company in good faith. It is a rule so prescribed to protect the innocent party doing bona fide business with a company. *It has been noted that even if the party who seeks to avail himself of this rule in his favour, does not have actual knowledge that an irregularity has happened, that party will still be precluded from availing himself if the circumstances were such as to put him on inquiry he failed to make. Sometimes, the very nature of the proposed transaction may put a party on inquiry, even if he has no special relationship with the company* (see, Walter Woon on *Company Law* (3rd

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Ed) at pp 80–100) (Emphasis added.) What has also become clear as well is that this: *Turquand*'s rule does not apply in a case where forgery is involved. That caveat to the rule was laid down by Lord Loreburn LC in the case of *Ruben v Great Fingall Consolidated* [1906] AC 439 at p 443 where he said like so:

> It is quite true that persons dealing with limited companies are not bound to inquire into their indoor management and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.

[61] Looking at the factual matrix in this case, pertaining to D4, it's involvement and role in the transactions that had led to some RM23m worth of funds belonging to and emanating from P1's and P7's accounts, who had no such huge unauthorised foreign exchange dealings with D4, finding their way to D4's bank account, must be viewed as highly suspicious, to say the least. The learned trial judge was correct in his appreciation of this issue based on the evidence before him. In fact, we thought that in the circumstances of this case, it was beyond 'putting D4 to inquiry'. We agreed with learned counsel for the plaintiffs, Mr Porres Royan, that D4 could not, in the circumstances obtaining in this case, avail itself of the *Turquand*'s rule by pleading that it had no notice whatsoever with the internal irregularities in the related affairs in P1 and P7. We found that the evidence adduced pointed quite clearly in the opposite direction, especially when one considers the testimonies of D1 and D2 pertaining to D3's role, taken together with the unexplained use by D4 of the expired license number in the preparation of the statutorily required listing of its clients. This had related to the 'Customer Account Listing' documents marked as exhs D717 and D718 at bundle C11 pp 2424–2430 and 2595–2602 respectively. The seven findings by the learned trial judge on circumstances reflecting the requisite state of mind of D4 were reasonably arrived at and supported by the evidence before him. To quote as an example, his finding at No 4 states as follows:

> The listing prepared and kept on his own admission by DW7 in the name of P1 as D4's customer had entries showing receipts from D3 personally, from D1, D3 and another from others unknown. DW7 clearly knew more than he owned up to and leads to the inference that the account was spurious and was a label to hide the true nature of the account.

[62] Learned counsel for the D4 had quoted the passage in *Palmer's Company Law* (24th Ed) where a commentary was made on the *Turquand*'s rule at p 247, inter alia, it was concluded that:

> He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in a good position as if it has been obtained.

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[63] We would have no quarrel with that conclusion by the learned authors, where indeed it must be predicated upon a bona fide conduct. But in this case, we were of the like view that was taken by the learned trial judge in that D4 had exhibited, from the overall evidence as adduced, that he lacked the necessary bona fides in his foreign currency transactions involving the unauthorised funds of P1 and P7.

[64] Learned counsel for D4 had also submitted that as a licensed money changer, it did not owe such an onerous duty of care to the respondents/plaintiffs. We are of the view that the duty of care is not an onerous one, but one that is incumbent on any reasonable money changer which is to make reasonable inquiries in the event that something suspicious were to emerge in any of the transactions that had involved him. The law does not impose an onerous burden in terms of duty of care, but one that is reasonable depending on circumstances obtaining in a given situation. What would a reasonable money changer do in like situation as D4? That would be the test and benchmark against which D4 ought to be tested and was rightly tested. On proper reflection and preponderance of the evidence adduced, the learned trial judge had found that D4 had come up short on that score. We did not think he had erred there.

[65] Indeed, D4 in its amended statement of defence had also pleaded in para 6.12 and 6.13 therein that its directors were questioned by the Bank Negara Malaysia a few times on the large amounts of funds that it had been receiving from the first plaintiff. The D4 then ended para 6.13 by stating as follows:

> Defendan keempat akan mengemukakan semua bukti-bukti untuk menyokong pengataan-pengataan defendan keempat seperti di atas pada hah perbicaraan kelak.

[66] It was observed by the learned trial judge that no such supporting evidence was forthcoming when D4 presented its case during trial. As such, D4 had not proved its pleaded case on the matter of the large sums that it had obtained from the first plaintiff. In para 6.12 it was pleaded by D4 that Bank Negara Malaysia had questioned its directors about the large funds from the first plaintiff. Inherent in that is that the large sums it received had aroused the interest of the Central Bank, which was also the regulator which exercised the statutory oversight over money changing activities, including that of D4. D4 had not explained why it had not led such evidence that it had pleaded it would, in its amended statement of defence dated 13 May 2011.

[67] Premised on the above, we would be much hard-pressed to conclude that D4 was an innocent party in the scheme of things pertaining to the impugned transactions. Clearly, therefore D4 would not be entitled to avail itself of the rule in the case of *Turquand*.

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[68] For good measure, the D4 had also put up a counterclaim against P1 for the sum of RM1,894,672.73 which according to D4 was the balance due under the running account for the foreign currency transmitted to and received by P1 for the use of P1 in 2010. The learned trial judge had dismissed this counterclaim by D4 and D4 had also appealed against that adverse finding by the learned trial judge. There was no documentary proof as noted by the learned trial judge to substantiate this counterclaim by D4 against P1. Contemporaneous documents that in the normal course of business would evidence such transactions of this nature were nowhere to be found as having been adduced by D4. There was not even a single letter authorising the opening of a running account by P1 with D4. There was no board resolution emanating from P1 authorising the transactions that had resulted in P1 owing monies to D4. As noted by the learned trial judge, there was no evidence that the cash were received by P1 through its duly authorised agent. He also noted that on the evidence, even D1 and D2 had said that the plaintiffs did not deal in such large amount for money changing with D4 and that if any, amounts were small amounts for staff expenses whilst travelling abroad on duty. We agreed with the finding of the learned trial judge that there was no evidence that the transactions in the overdrawn amounts were authorised by PI with respect, we agreed with him that the counterclaim by D4 ought not to succeed on the evidence as adduced before him.

THE APPEAL OF D5 (NANJ GLOBAL RESOURCES SDN BHD)

[69] We now come to the appeal of the 5 defendant, NANJ Global Resources Sdn Bhd (D5). The learned trial judge had entered judgment in favour of plaintiff Liang Court (M) Sdn Bhd (P4) against D5 for the sum of RM400,000. D5 was a general trader and a commission agent. It was established through evidence that there existed no business relationship between P4 and D5. This factual circumstance was never in dispute. What was disputed had been the fact relating to D5 having a sum of RM400,000 transmitted into D's account from the account of P4 for which no consideration had flowed from D5. The evidence of D5's director, a witness by the name of Ameer Reehan was introduced in court and it was his testimony that D4 (Akbar Money Changer) was indebted to D5 to the tune of RM400,000. Somehow, at the request of D4, P1 had remitted, through P4 the said sum of RM400,000 to D5. But there was no record shown in court of any justification for such amount of money to have been transmitted from P4's account to D5's account. It must be recalled that the claim by P4 against D5 was one that was premised upon knowing receipt. How could that sum of RM400,000 have justifiably found its way into D5's bank account in the circumstances in which it did? There was no authorisation emanating from P4 for such money to be so transmitted to D5's account. Indeed, this transaction was a curious one and one that was clearly and completely lacking any bona fide on the part of D5 when the sum of RM400,000 was received in its account

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from an 'utter stranger' in the form of P4 with whom D5 had no commercial dealings whatsoever. The sum of RM400,000 was not a meager sum by any reasonable standard. As such, the learned trial judge was correct when he ruled, at p 379 of the record of appeal, that D5, 'under the circumstances is affixed with the knowledge that the transaction was not genuine and it cannot be allowed to retain the benefit of the said payment'. We agreed with Mr Porres Royan, learned counsel for the fourth plaintiff that the claim for knowing receipt against D5 had been proven on the balance of probabilities.

[70] Under the circumstances, we found that the learned trial judge had not been plainly wrong in the appreciation of the evidence before him and the attendant application of the legal principles by him on the facts as found by him in respect of his findings against D4 and D5. As such, there is no reason for us to exercise our appellate powers as was urged upon us by learned counsel for D4 and D5. The judgment entered against D4 and D5 was affirmed and their appeals were therefore dismissed with costs.

[71] At the end of it all, we noted that these appeals, in the main, had been against the findings of facts by the learned trial judge. Except for the appeal of D7, we had found that the findings of facts by the learned trial judge had been impeccable and that there was nothing regarding them which would require our curial intervention in exercise of our appellate powers. We also found that, except for D7's appeal, he had applied the law soundly to the facts as found by him. We need only to advert to what was said by the apex court in the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 so as to remind ourselves of that solemn rule of practice that has almost crystallised into law and which practice has been religiously observed by our courts in exercising their appellate powers. The learned Justice Gopal Sri Ram JCA (as he then was) had put it, thus:

> We also considered some of the categories in which appellate interference is warranted. We find it unnecessary to repeat what we said there. Suffice to say that we re-affirm the proposition that an appellate court will not generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision.

[72] As such, in the upshot, we therefore had affirmed the learned trial judge's decision in relation to all the defendants (including the dismissal of D4's counterclaim) except against D7, for the reasons that we had alluded to above. His decision with regard to D7 was set aside with costs.

[73] As to interest in respect of judgment in favour of the plaintiff against D4 and D5 it shall be at the rate of 5%pa from the date of judgment until realisation.

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[74] Similarly, there shall be interest at the rate of 5%pa from the date of judgment entered in favour of D7 until the date of realisation.

[75] As to costs, D1, D4 (including the costs for dismissal of its appeal on its counterclaim), and D5 to pay costs of RM 30, 000 each to the relevant plaintiffs. There was no order as to costs against the second defendant.

[76] With regard to D7, the first and fourth plaintiffs were ordered to pay costs of RM90,000 to D7.

Order accordingly.

Reported by Kanesh Sundrum